

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION  
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 33-04

DECISION NO. 423 - MEC

DECISION AND ORDER

**APPEARANCES**

Schwerin, Campbell and Barnard by *Robert Lavitt*, Attorney, appearing for the Inlandboatmen's Union of the Pacific (IBU).

Christine Gregoire, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries (WSF).

**STATEMENT OF THE CASE**

This case is before the MEC based on a complaint filed by the Inlandboatmen's Union of the Pacific (IBU) on January 30, 2004. The complaint alleges that Washington State Ferries (WSF), in its request for proposals (RFP), unilaterally excluded the requirement that the on-shore concessionaires

a. abide by the collective bargaining agreement the IBU has with the previous employer (SODEXO) and

b. give preferential hiring to previous SODEXO (IBU members) employees.

The complaint alleges that WSF's decision to unilaterally issue an RFP that fails to require vendors bidding for on-shore retail service work to both honor the collective bargaining

agreement and offer preferential hiring to laid off SODEXO (IBU members) employees constitutes an unfair labor practice.

When settlement efforts failed to resolve the issue between the parties, the matter was set for hearing before MEC Chairman John Swanson on March 19, 2004. The hearing was re-scheduled to allow WSF to file a Motion for Summary Judgment requesting a dismissal of Case No. 33-04 as without merit.

On April 5, 2004 IBU filed a brief in opposition to WSF's Motion for Summary Judgment. On April 9, 2004 WSF filed a reply brief to IBU's opposition. The factual record before the MEC was not sufficient for determination of the issues raised by WSF in its Motion and the Motion was denied by the MEC. The matter was then scheduled and heard on Monday, May 10, 2004. The hearing was continued until Friday, May 21, 2004 to hear a relevant witness who because of an emergency situation was unavailable on May 10, 2004. Briefs were timely filed by both parties.

#### **RECORD BEFORE THE COMMISSION**

1. The complaint of the IBU charging Unfair Labor Practice.
2. WSF's Motion for Summary Judgment.
3. IBU's brief in opposition to WSF's Motion for Summary Judgment.
4. WSF's reply brief to IBU's opposition brief.
5. MEC's order denying WSF's Motion for Summary Judgment.
6. Transcripts of the Hearing of Case No. 33-04 held on May 10 and May 21, 2004.
7. The official record of MEC Case No. 52-03 (Decision No. 392-MEC) which has been made part of the record of Case No. 33-04.
8. WSF's and IBU's post hearing briefs.

## **STATEMENT OF THE ISSUES**

- A.** Does the Marine Employees' Commission have jurisdiction over the unfair labor practice charge relating to the way in which Washington State Ferries is seeking entities to offer food and beverage service on certain on-shore or non-vessel properties under the control of Washington State Ferries?
- B.** If so, did Washington State Ferries commit an unfair labor practice by issuing requests for proposals for on-shore concessions that do not require that bidders give preferential hiring to the employees of the previous concessionaire and that do not set any mandatory working conditions affecting the employees who would work for the new concessionaire?

## **DISCUSSION OF THE PARTIES' POSITIONS**

### **IBU Arguments:**

IBU argues that the MEC has already established that it has jurisdiction to hear the dispute presently before it. That jurisdiction was established in the resolution of Case 52-03. WSF inclusion of labor provisions in past RFPs established a practice that cannot be unilaterally eliminated. Previously, WSF's concessionaire did the on-shore retail work with IBU-represented personnel and WSF previously did not issue a requested RFP. Prior to 2003 WSF combined on-shore work and vessel work into a unified RFP.

IBU argues that because on-shore concession segments of the current RFP have the same pre-2003 history as vessel segments, the MEC's previous findings in Decision No. 392 should apply to on-shore concessions as well as vessel concessions. Prior to the 2003 RFP, WSF had a single concessionaire for all ferry system vessels and the on-shore work and jurisdiction were co-extensive with the vessel concessionaire. Even in areas where the concessionaire did not have an

active operation such as Vashon or Clinton, the parties understood that retail concession work performed on State property fell within the province of the concessionaire and therefore the IBU's jurisdiction. The testimony of WSF's Food Service Manager (1991-1998), Mr. Firth, supports the Union position regarding the 1991 Food Service Concession Contract, which was executed with Marriott, SODEXO's predecessor. The contract specifies that with respect to WSF terminals, the concessionaire's premises shall consist of:

- (b) Food/beverage vending machine, amusement game machine and portable concession cart/trailer areas at all existing (except Sidney, British Columbia) and future ferry system terminals (including auto holding area)....
- (a) Snack bar and gift shop space at the Anacortes ferry terminal....
- (b) Snack bar, gift cart and commuter lounge space on the upper level of the Seattle ferry terminal....
- ....
- (f) All food preparation areas, serving areas, dining areas, storage areas, fixtures, equipment, floor and wall coverings and ceiling in the terminal concession premises.

In 1996 the food service contract defined the concessionaire's premises in terms almost identical to the 1991 contract:

- (c) Food/beverage vending machine, amusement game machine and portable concession cart/trailer areas at all existing (except Sidney, BC) and future WSF terminals (including auto holding areas)....
- (d) Snack bar and gift shop space at the Anacortes ferry terminal...
- (e) Snack bar and gift shop space on the upper(passenger) level of the Seattle ferry terminal....
- (f) All food preparation areas, serving area, dining areas, storage areas, fixtures and equipment in the terminal concession premises...

IBU has historically been employed to perform on-shore work when performed by the concessionaire as indicated in the service contracts. The issue adjudicated in MEC Case 52-03 involves a separate and distinct legal right from this case before the Examiner—the union's right to require WSF to offer preferential hiring to galley workers and to apply terms of the collective bargaining agreement to such employees does not affect the similar right of the union to apply

the same requirement to on-shore service workers. A decision as to whether the WSF is required to include protective language in the on-shore retail RFP will not affect the MEC's earlier decision regarding galley workers. The union argues that any decision in Case No. 33-04 will not affect the decision in Case No. 52-03. The evidence relied on by the complainant in 33-04 is substantially different and the two cases do not involve infringement of the same right.

The cause of action in the present litigation is not identical to the prior litigation. IBU urges the MEC to find merit in this ULP and order WSF to amend Section II and III of its RFP to include the omitted labor provisions.

**WSF Arguments:**

In 2003 WSF issued a RFP for concession services. This RFP was separated into seven distinct segments corresponding to different types of concession operations. Contractors could bid on any of the seven independently. The union contends WSF should be ordered to amend segments two and three of the RFP to include labor protective language. Segments two and three are respectively on-shore food and beverage operations and on-shore news, books and convenience operations. WSF believes the complaint should be dismissed for three separate and distinct reasons.

First, the MEC is without jurisdiction to order relief in favor of a bargaining unit that is not composed of ferry employees. RCW 47.64.80(3) requires MEC orders in such cases to be directed to "the ferry employee or the ferry employee organization representing him or her and the Department of Transportation". These terms are defined at RCW 47.64.011 (5), (6):

(5) "Ferry employee" means any employee of the marine division of the Department of Transportation who is a member of a collective bargaining unit represented by a ferry employee organization and does not include an exempt employee pursuant to RCW 41.06.079.

(6) "Ferry employee organization" means any labor organization recognized to represent a collective bargaining unit of ferry employees.

Both of these definitions specifically focus on the bargaining unit to which the employees belong, not merely the umbrella labor organization such as the IBU. The IBU represents units of ferry employees, but the onshore concession employees' unit is clearly not one. Those employees are private-sector employees, and RCW 47.64 does not grant jurisdiction over their disputes to the MEC. The statutory definition of unfair labor practice provides:

**47.64.130 Unfair labor practices for employer, employee organization, enumerated.** (1) It is an unfair labor practice for ferry system management or its representatives:

.....  
(c) To refuse to bargain collectively with the representatives of **its employees**. (Emphasis added).

This excludes any duty to bargain with representatives of persons not employed by WSF.

Thus, the MEC lacks jurisdiction over disputes, including unfair labor practices not comprised of WSF employees.

Second, in Decision No. 392, MEC decided WSF is not obligated to include labor protective language in those segments of the 2003 RFP's dealing with on-shore concessions. At the close of the hearing, WSF counsel renewed his motion for dismissal on the grounds of res judicata. This case is a magnificent example of the reason for the criterion of the concept that the parties should only be allowed to litigate a case once. Within days of the receipt of MEC Decision No. 392, WSF took action to comply with the order. IBU did not promptly object, did not request a clarification of the MEC ruling, did not file an appeal or cross-appeal. Instead, the IBU chose to file a new ULP, this case of January 30, 2004. WSF is still under a cloud of uncertainty with respect to its ability to enter into concessions contracts for on-shore services.

The doctrine of res judicata was developed to prevent litigation on the same matters by the same parties. The IBU's argument is that the previous case involved galley workers and MEC Decision No. 392 "focuses singularly on the fate of the RFP for galley work". The doctrine of res judicata prevents the same parties from re-litigating issues that could have been raised in prior proceedings. MEC Decision No. 392 was limited by its terms to galley employees aboard WSF vessels. The IBU did not appeal that limitation and the time for appeal has passed. The present case should be dismissed on the grounds of res judicata, in the interest of administrative economy.

Third, the IBU did not meet its burden of demonstrating a prior practice of including labor protective language in RFPs for on-shore concessions operations. The arbitrator should dismiss this case on one or both procedural grounds – lack of jurisdiction or res judicata. However, if the MEC chooses to decide the case on its merits, it is obvious there is absolutely no merit of prior past practice with respect to terminal or on-shore operations.

No RFPs for terminal or on-shore concession services were introduced by the union at the hearing on this case. IBU admitted to exceptions to this claim of jurisdiction. The largest at Colman Dock. Employees at Anacortes snack bar, a seasonal operation, were allowed to remain non-union for the first summer joining IBU only if they returned for a second summer. Brian Volkert testified with respect to the Anacortes snack bar. SODEXO's manager told him it was a non-union operation. IBU was to provide a list of union members who worked at the snack bar during the last three years of its operation and did not provide the requested list.

Even if IBU officials believed that on-shore concession work was IBU work, a belief riddled with exceptions, it is clear WSF had no such belief. WSF testified that on-shore concession operations were always regarded as site specific and it had the option of contracting

with vendors other than vessel concession operators for such service. This option is borne out by the WSF witnesses and the clear fact that no past practice was established that on-shore concessions were tied to the IBU in any way. IBU has clearly failed to meet its burden of proving that WSF has violated past practice with respect to on-shore concession operations.

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After careful study of the record, the parties' arguments and the law, the Marine Employees' Commission hereby makes the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. Washington State Ferries issued a seven segment request for proposals among which were requests for proposals to operate food and or beverage service and sales of other items on on-shore premises, that is, premises other than the vessels that are under its control.

2. The services sought are services for the convenience of the ferry riders.

3. The requests for proposals at issue made up two of the seven issued by Washington State Ferries for various on-board and on-shore services.

4. The ULP charge before the Marine Employees Commission does not question the decision to divide the request for proposals into different segments.

5. The request for proposals segment for on-vessel food and beverage service came before the Marine Employees Commission in a case that resulted in MEC Decision No. 392. That matter was not re-litigated in this case although both parties did argue that that earlier decision should cause a result in this case favorable to them.

6. The case which led to Decision 392 did not focus on the on-shore services segments at issue in this case. That earlier case did not develop a sufficient factual record regarding those on-shore services nor were the issues in this case argued in the earlier case.



7. The request for proposals segments dealing with on-shore concessions did not include any requirement that the bidders grant preferential employment rights to anyone previously employed by the previous concessionaire nor did those segments set any terms or conditions of employment for such employees as a concessionaire might employ if it were a successful bidder.

8. There is no evidence in the record to indicate that Washington State Ferries has ever required a bidder for an on-shore concession to grant preferential hiring rights for that concession work, or seniority or any other condition of employment to any particular person or group of employees or prospective employees.

9. In the past, both the concessionaire that operates the on-vessel concessions and other outside entities have operated on-shore concessions under contract or with the apparent acquiescence of Washington State Ferries. There is no consistent past practice with regard to these concessions.

10. Employees hired to work on-shore concessions were not part of the crews of the vessels operated by Washington State Ferries. They did not do work aboard the vessels and they did not have any on-board responsibilities. They did not interact with the crews of those vessels with respect to work responsibilities on the vessels.

11. The on-shore concession workers were not under the control of the vessel captains.

12. There is no evidence that Washington State Ferries management personnel exercised any control over the work performed by such employees nor did it ever seek to directly affect the working conditions of the on-shore concession employees.

13. Some of the on-shore concession workers were covered by the terms and conditions of an IBU contract but others were not.

14. There is no evidence in the record to support the argument that Washington State Ferries is a de facto employer of the on-shore concession workers because there is no evidence that authority to affect the working conditions of those on-shore workers has ever been claimed or exercised by Washington State Ferries.

### **CONCLUSIONS OF LAW**

1. The Marine Employees Commission has jurisdiction to decide the issues brought before it by the instant unfair labor practice charge.

2. This case was not decided by the earlier case (Decision No. 392) and the principles of res judicata and/or collateral estoppel do not apply to this matter nor do they control the matter.

3. Washington State Ferries has neither claimed nor exercised the right to control or affect any of the wages or working conditions of the on-shore concession workers so as to make itself an employer or co-employer of those workers.

4. The conditions that brought the on-vessel concession employees within the scope of RCW 47.64 (MEC Decision 392) do not exist with respect to the on-shore concessions at issue in this case.

5. There is no legal basis for the assertion that Washington State Ferries has a legal obligation to impose employment conditions upon those seeking to operate on-shore concessions.

6. As a consequence, Washington State Ferries' failure to impose employment conditions for on-shore concession workers in its requests for proposals is not a violation of the law of RCW 47.64. The requests for proposals at issue in this case are not unfair labor practices.

On the basis of these Findings of Fact and Conclusions of Law and on the basis of a thorough review of the record, the parties' arguments and the law, the Marine Employees' Commission hereby

**ORDERS**

This unfair labor practice case is dismissed. There is no award of costs and/or attorney fees and each side is to bear its own costs and/or attorney fees.

**RECONSIDERATION**

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration of MEC's unfair labor practice ruling with the Commission within ten days from the date this final order is mailed. Any petition for reconsideration must state the specific grounds for the relief requested. Petitions that merely restate the party's previous arguments are discouraged. A petition for reconsideration does not stay the effectiveness of the Commission's order.

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If no petition for reconsideration is filed in a timely fashion, the Marine Employees' Commission will issue a second Order, which will state that this Order has become final and binding in accordance with RCW 47.64.280. That second Order will start the period running for any appeal to the Washington State Superior Court, pursuant to RCW 34.05.542 and 34.05.514.

DATED this 23rd day of July 2004.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Hearing Examiner

Approved by:

/s/ JOHN SULLIVAN, Commissioner

/s/ JOHN BYRNE, Commissioner